Supreme Court, U.S.
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No. 99-513

In the Supreme Court of the United States

TEXAS TECH UNIVERSITY, ET AL., CROSS-PETITIONERS

v.

UNITED STATES OF AMERICA,
EX REL. CAROL RAE COOPER FOULDS, ET AL.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a State or state agency is a "person" subject to potential liability under the False Claims Act, 31 U.S.C. 3729.

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OPINIONS BELOW

The opinion of the court of appeals (99-365 Pet. App. 1a-34a)* is reported at 171 F.3d 279. The opinion of the district court (99-365 Pet. App. 35a-50a) is reported at 980 F. Supp. 864.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 1999. A petition for rehearing was denied on June 1, 1999 (99-365 Pet. App. 51a-52a). Petitions for a writ of certiorari were filed on August 23, 1999 (No. 99-321) and August 27, 1999 (No. 99-365). The conditional

* References to "99-365 Pet. App." are to the appendix to the petition for a writ of certiorari in *United States* v. *Texas Tech Univ.*, No. 99-365.

cross-petition for a writ of certiorari was filed on September 20, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The False Claims Act (FCA), 31 U.S.C. 3729 *et seq.*, prohibits a variety of deceptive practices involving government funds and property. 31 U.S.C. 3729(a)(1)-(7). A "person" who violates the FCA "is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains." 31 U.S.C. 3729(a). Suits to collect the statutory penalties may be brought either by the Attorney General, or by a private person (known as a relator) in the name of the United States, in an action commonly referred to as a *qui tam* action. See 31 U.S.C. 3730(a) and (b)(1); 99-365 Pet. 3.

2. The instant case involves a *qui tam* action filed by Carol Rae Cooper Foulds. The defendants included Texas Tech University and Texas Tech University Health Sciences Center. Those state entities are the cross-petitioners in this Court. The district court denied the state defendants' motion to dismiss the *qui tam* claims against them. 99-365 Pet. App. 35a-50a. The court of appeals reversed, holding that the suit was barred by the Eleventh Amendment. *Id.* at 1a-34a; see 99-365 Pet. 4-5.

3. The relator and the United States filed petitions for a writ of certiorari. See *United States ex rel. Foulds* v. *Texas Tech Univ.*, No. 99-321; *United States* v. *Texas Tech Univ.*, No. 99-365. Those petitions present the question whether the Eleventh Amendment bars a *qui tam* suit against a State or state agency.

Those petitions are currently pending before this Court.

DISCUSSION

The conditional cross-petition for a writ of certiorari argues (at 14) that, if this Court grants certiorari in No. 99-321 or No. 99-365, it should also consider the question whether a State or a state agency is a "person" subject to potential liability under 31 U.S.C. 3729(a). On November 29, 1999, this Court heard oral argument in *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, No. 98-1828. That case presents the same question of statutory interpretation that is presented in the conditional cross-petition here, as well as the same Eleventh Amendment question that is presented in Nos. 99-321 and 99-365. See 98-1828 Pet. at i. The conditional cross-petition for a writ of certiorari should therefore be held pending this Court's decision in *Vermont Agency of Natural Resources* and then disposed of as appropriate.

CONCLUSION

The conditional cross-petition for a writ of certiorari should be held pending this Court's decision in *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, No. 98-1828 (argued Nov. 29, 1999), and disposed of as appropriate in light of the resolution of that case.

Respectfully submitted.

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Solicitor General

DECEMBER 1999